ELIA HUSEIN AHMAD SALIM TALIB & ORS.

v.

HONG KONG BANK TRUSTEE (SINGAPORE) LTD.

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[ORIGINATING SUMMONS NO. 889 OF 1988]
14 NOVEMBER 1988

TRUSTS: *Discretionary trust - Construction of trust deed - Whether secondary beneficiaries entitled to income if principal beneficiary is a defaulting beneficary - Whether trustee discretion extends to total non-payment.*

One Hussein the husband and father of the plaintiffs was a principal beneficiary of a discretionary trust. The defendants are trustees of the said trust. Hussein was at one time a trustee of the trust but by an order of Court in another action ("the order") he and the other trustees then were removed as trustees due to certain unauthorised investments. Paragraph 10 of the order stated that "none of the defaulting trustees shall be entitled as beneficiaries under the trust to receive any income arising under the trust until the New Trustee shall certify that such defaulting trustee may properly do so or until further order".

Due to the above Hussein was deprived of his right to receive his share in the net income of the trust - a further reason was that Hussein had been adjudicated bankrupt on 13 March 1987.

Under Clause 4(2) of the trust deed (see reproduction in full in the judgment) a discretionary trust was automatically set up.

The plaintiff being Hussein's wife and childern applied to the Court for an order that the defendants as trustees do pay or apply all that part of the share of the trust Hussein was entitled to for maintenance the support or benefit.

The defendants contended that:

(i) Paragraph 10 of the order forbids it;

(ii) Hussein being still in default is deemed to have received his share by anticipation and is therefore not entitled to any payment until the default is remedied. There is nothing that is being held upon trust for the plaintiff - therefore Clause 4(2) of the trust does not come into effect; and

(iii) The defendant's discretion as trustees under the said Clause 4(2) is an absolute one.

Held:

[1] In so far as Clause 10 of the order is concerned it only restrained Hussein from receiving any income as a beneficiary - it does not affect the rights or entitlement of the spouse and children of the principal beneficiary upon the failure or determination of the life interest of the principal beneficiary.

[2] The very object of the secondary trust created by Clause 4(2) of the trust is for the welfare and support of the childern and remoter issue of the settlers and not to punish the remoter issue with the sins of their father or mother.

[3] There should be nothing to impel a trustee, when applying the income for the support of the family of a principal beneficiary, to take into account the debt due from the principal beneficiary to the trust.

[4] The discretion given to the trustee is to decide which of the persons the trustees think most deserve a grant of maintenance or support.

[5] The discretion of the trustee does not extend to withholding maintenance or support altogether to any of the class of persons.

[Application allowed.]

Cases referred to:
Re Balfour Settlement [1983] 1 Ch 928
Re Dacre [1916] 1 Ch 344
Re Eiser's Will Trust [1937] 1 All ER 244

Legislation referred to:
Trustees Act [Sing], s. 38(1)(b)

Other Sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 48 at para. 944
Modern Equity by Hanbury A & Maudsley (11th Edn.,) at p. 274-5

JUDGMENT

Chao Hick Tin JC:

This is an application by the wife and two childern of a former beneficiary trustee, one Hussein Ahmad Salim bin Talib (hereinafter called "Hussein"), for maintenance and support under a discretionary trust following an event of forfeiture of the life interest of Hussein, a principal beneficiary. The defendants are the present trustees of the settlement.

By an indenture dated 7 October 1933, certain immovable properties were conveyed to trustees who were to stand possessed of the settled properties upon trust for the settlor during his life and after his death for a period of the life of the last survivor of thirty-seven named persons plus twenty-one years (less ten days) after the death of the last survivor (hereinafter called the "period of the settlement") the trustee shall hold the net income of the settled properties upon trusts for the sons and daughters of the settlor, or the issues of such sons who pre-deceased the settlor. But it is expressly provided that these trusts in favour of the issues or remoter issues of the settlor shall take effect subject particularly to the provisions contained in Clause 4 of the indenture.

I shall now set out in full the provisions of Clause 4(1) and (2):

> 4. The share in the net income of the settled property whether original or accruing to which any person being a child or remoter issue of the settlor would in the absence of this Clause for the time being be beneficially entitled in possession under the foregoing trusts during his or her life or until the expiration of the period of the settlement shall be held upon the following trusts, that is to say:
>
> (1) Upon trust for the same person (hereinafter called "the principal beneficiary") during his or her life but not exceeding the period of the settlement or until he or she (whether before or after the determination of any prior life interest) does or suffers any act or thing or until any event happens whereby if such share of the net income were payable to him or her during his or her life absolutely he or she would be deprived of the right to receive the same or any part thereof in any of which cases as well as on the death of the principal beneficiary which first happens, this trust of such share of the net income shall fail or determine.

(2) If the trust fails or determines during the life of the principal beneficiary then during the residue of his or her life but not exceeding the period of the settlement such share of the net income shall be held upon trust for the application thereof for the maintenance or support or otherwise for the benefit of all or any one or more exclusively of the other or others of the following persons that is to say:

(a) the principal beneficiary and the wife or wives or husband of the principal beneficiary, if any, and his or her children or more remoter issue if any, or

(b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the person who if he or she were actually dead would be entitled to his or her share of the net income as the trustees in their absolute discretion without being liable to account for the exercise of such discretion shall think fit provided always that if there shall be no issue, wife or husband of the principal beneficiary the trustees shall out of such share of the net income provide food and clothing and housing accommodation for the principal beneficiary until his or her death or until the expiration of the period of the settlement whichever first happens.

As a result of certain unauthorized investments in Australia, the then trustees of the settlement, including Hussein, were by an order of Court dated 22 July 1986 made in orginating summons 1269/85 removed as trustees. Under para. 10 of the order of Court, it was ordered that "none of the defaulting trustees shall be entitled as a beneficiary under the settlement to receive any income arising under the settlement until the new trustee shall certify that such defaulting trustee may properly do so or until further order." An injunction was also granted against each of the defaulting trustees from removing any of his assets from Singapore or realizing, drawing upon or using in any way the assets save for, *inter alia*, the purpose of "enabling the defaulting trustee to receive an allowance of such amount per month as shall be agreed... to cover his reasonable living expenses and those of his immediate family."

In consequence of this order of Court, Hussein has been deprived of the right to receive his share in the net income of the settlement. The plaintiffs contend that following that event the trust of a life interest in favour of Hussein has failed or determined in accordance with Clause 4(1). They further contend that if there is any doubt about such a failure or determination, Hussein being adjudicated a bankrupt on 13 March 1987 has indisputably caused such a failure or determination. Therefore, the discretionary trust set out in Clause 4(2) comes into operation.

In my view, a forfeiture has occurred when the share of the net income of the settlement due to Hussein (and the other former trustees) was impounded by the order of Court to make good a breach of trust: See *Re Balfour Settlement* [1983] 1 Ch 928.

For the purposes of the present proceedings, the plaintiffs concede that their father, Hussein, as one of the former trustees, owes the settlement an amount in the region of Australian $800,000.

In the affidavit filed on behalf of the present trustees, it is contended that the plaintiffs are not entitled to any maintenance or support under Clause 4(2) for the following reasons:

(i) paragraph 10 of the order of Court of 22 July 1986 forbids that;

(ii) Hussein is still in default and has not made good the amount he owes the settlement. He is deemed to have received his share by anticipation and is therefore not entitled to any payment until the default is remedied. There is nothing that is being held upon trust for the plaintiffs. Accordingly, Clause 4(2) of the indenture does not come into effect;

(iii) The defendants' discretion as trustees under Clause 4(2) is an absolute one.

I will deal with each of these three grounds of objection by the defendants in turn. In so far as para. 10 of the order of Court of 22 July 1986 is concerned, it talks about "none of the defaulting trustees shall be entitled **as a beneficiary** under the settlement to receive any income arising under the settlement until..." I think the scope of this paragraph is plain on the face of it. It restrains the defaulting trustees from receiving any income **as a beneficiary**. It in no way affects the rights or entitlement of others like those of a spouse or children of such a principal beneficiary following the failure or determination of the life interest of the principal beneficiary.

This leads me to the second ground, which is the main point argued by Counsel for the defendants. He submitted that as Hussein is in default and is owing a substantial sum to the settlement, until the amount owing is paid up, the spouse or children of Hussein are not entitled to any maintenance or support under Clause 4(2)(a) of the indenture. In support of this proposition he cited *Re Dacre* [1916] 1 Ch 344 where Cozen-Hardy MR said (at p. 346-7):

> It has been settled by a long series of authorities, which are binding upon us, that a defaulting trustee cannot claim a share in the estate unless and until he has made good his default and the true principle, I think, is that which is laid down by Sir George Jessel in *Jacobs v. Rylance* and which is again affirmed by Stirling J in the case of *Doering v. Doering* and lastly emphatically affirmed by Parker J in *Re Towndrow* where during the course of the argument he said this: 'The real principle is that where there is an aggregate fund in which the trustee is beneficially interested and to which he owed something, he must be taken to have paid himself that amount on account of his share.'

Halsbury's Laws of England, 4th Edn., Vol. 48 at para. 944 states the principle thus:

> Where a trustee who is also a beneficiary commits a breach of trust, **his beneficial interest** in the trust property is liable for making good the loss occasioned thereby before he can claim anything for himself. His assignee is in no better position than he, even when the breach was committed by him after assigning his beneficial interest. (Emphasis added)

However, I do not think the position of the plaintiffs in the present settlement is quite the same as that discussed in *Re Dacre*. The order of Court of 22 July 1986, deprived Hussein of his right to receive his share of the net income. In consequence thereof the trust set out in Clause 4(2) arises, which is basically for the benefit of the family of a principal beneficiary. In my view, the very object of such a secondary trust is for the welfare and support of the children and remoter issues of the settlors, and not to punish the remoter issues with the sins of their father or mother. The principles in *Re Dacre* should be confined to the situation where the defaulting trustee is still entitled to claim as beneficiary against the trust.

I think I am fortified in this view by the decision in *Re Eiser's Will Trust* [1937] 1 All ER 244. In that case one of the trustees owed the estate a sum of money. That trustee was also given a protected life interest in the income of the testatrix's estate. That trustee having executed a deed of assignment for the benefit of his creditors the primary trust of a protected life interest in his favour was determined. As a result, the trustees held the income to be applied at their discretion for the maintenance and support of the class mentioned in the Trustee Act 1925, which included the principal beneficiary. The question was: if the trustees should decide to apply the income or part thereof to the maintenance and support of the principal beneficiary, must such sum be applied first to the reduction of the debt which the principal beneficiary owed to the estate. The Court held that the trustees could apply such

part of the income for the support of the principal beneficiary without reference to the payment of the debt. *A fortiori,* there should be nothing to impel a trustee, when applying the income for the support of the family of a principal beneficiary, to take into account the debt due from the principal beneficiary to the trust.

Turning to the third point, I would first observe that the provisions of Clause 4(2) are not identical to those of s. 38(1)(b) of our Trustees Act. Further the proviso to Clause 4(2)(b) is also additional. In the course of submission, Counsel for the defendants seemed to say that that part of the provision in Clause 4(2)(b) (quoted in full above) commencing with the words "as the trustees in their absolute discretion..." until the end of that provision was wrongly typed and set and that that part should qualify both Clause 4(2)(a) and (b) rather than just (b). Having examined the structure of Clause 4(2), I am inclined to agree with this submission. Now let me explain. The trust under Clause 4(2)(a) is for "the benefit of all or any one or more ... of the following person... the principal beneficiary and the wife or wives or husband of the principal beneficiary, if any and his or her childern or more remoter issue if any" and unless the expression "as the trustees in their absolute discretion... shall think fit" also qualifies that, Clause 4(2)(a) seems to me to be incomplete. Who is to determine which of the persons under (a) should have the share of the net income for maintenance and support? Further, if that part is only intended to qualify (b) there would have been no need to repeat in the proviso to (b) the words "if there be no issue, wife or husband of the principal beneficiary" because (b) is itself concerned with the situation where is no wife or husband or issue of the principal beneficiary in existence.

Obviously if I were to interpret Clause 4(2)(a) in the form in which it appears in the Indenture, no discretion would seem to be vested in the trustees. But if I should be right in thinking, as I think I am, that there was an error in the typing and setting out of the provisions of Clause 4(2) and that the Clause should be construed as so amended, then I do not accept the defendants' contention that the trustees' discretion whether to grant maintenance or support under this Clause is an absolute one. In my view the discretion lies in deciding which of the persons the trustees think most deserve a grant of maintenance or support. I do not think it goes to the extent of giving the trustees the discretion to withhold maintenance or support altogether to any of that class of persons. Indeed, the proviso is most telling and it shows quite clearly that that could not be the intention of the settlor. The proviso requires the trustees to provide food, clothing and accommodation out of the relevant share of the net income to the principal beneficiary in the event that the principal beneficiary shall be without spouse or issue. The settlor obviously cared for his children (the principal beneficiaries) and his remoter issues and wished to see that they are adequately provided for. His intention was entirely benevolent.

Finally, I would like to refer to a passage in "*Modern Equity*" by Hanbury A & Maudsley (11th Edn.,) at p. 274-5 which reads:

> When a forfeiture has taken place, the life interest of the principal beneficiary is terminated, and the trusts in s. 33(1)(ii), or those expressly contained in the instrument, as the case may be, come into play ... Under s. 33 (s. 38 of our Trustees Act) there are discretionary trusts in favour of the principal beneficiary and other persons, depending on whether or not a spouse or issue of the principal beneficiary is in existence. The trustees may apply the income for the remainder of the trust period for any member of the discretionary class. The principal beneficiary is not entitled to any income; but the trustees may, if they wish, pay it to him. **They must pay the income to one or more of the members.** (Emphasis added).

I think this passage supports what I have just said.

In the result I would grant an order in the terms prayed for in this originating summons:

> That the defendants as trustees of the settlement do pay or apply all the 2/12 or 2/33 share of the net income of the beneficiary, Hussein Ahmad Talib under the settlement dated 7 October 1933 from 22 July 1986 for the maintenance or support or otherwise for the benefit of the plaintiffs who are the daughter, son and wife of the said beneficiary under Clause 4(2) of the said settlement.

The costs of the application of both parties be paid out of the capital of the settlement and be fixed at $2,500 for each.

Also found at [1989] 1 CLJ 547